IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0041

THE STATE OF MONTANA,

Plaintiff and Appellee,

v.

TIMOTHY G. WALTER,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Montana Fourth Judicial District Court, Missoula County,

The Honorable John W. Larson, Presiding.

APPEARANCES:

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ISSUE PRESENTED

I. Did the admission of a purportedly "self-authenticating" driving record, stating that Defendant Timothy Walter's license had been suspended at the time of his arrest, violate his right to confrontation and cross-examination in a trial for driving with an administratively suspended license, given that no one was required to testify regarding the genesis and contents of the driving record?

STATEMENT OF THE FACTS AND PROCEEDINGS

On June 16, 2009, Defendant/Appellant Timothy Walter was stopped in Missoula by Montana Highway Patrol Trooper Sean Finley after Trooper Finley observed Mr. Walter make a left turn in his minivan without using his turn signal. Trooper Finley eventually arrested and ticketed Mr. Walter for driving with a suspended license (hereinafter, sometimes referred to as "driving while suspended"). Trooper Finley also ticketed Mr. Walter for driving while not wearing his seatbelt. (Trial Tr. at 94-98.)

After Mr. was found guilty on both citations in Missoula County Justice Court, he appealed his convictions to the Missoula County District Court and received a jury trial there on November 9, 2009. (Trial Tr. at 1.)

After his district court jury was chosen, the court instructed the jury, in part, per the State's proposed instruction, as follows:

You are instructed that a person commits the offense of driving while his license was suspended or revoked if he operates a motor vehicle upon a public highway of the state at the time when the person's privilege to do so is suspended or revoked in this state or any other state.

The court then instructed:

To convict a person of driving while his license was suspended or revoked, the State must prove the following propositions:

That the Defendant:

1. Was driving a vehicle
2. Upon a public highway
3. While his license was suspended or revoked by this state ....

If you find from your consideration of the evidence that all of these elements have been proved beyond a reasonable doubt then you should find the Defendant guilty.

The Court also instructed:

You are also instructed that ignorance of the law is no defense in Montana ....

Regarding a person's notification that his driver's license has been administratively suspended, the court instructed:

An individual has been adequately notified that his or her driver's license will be suspended for failing to pay court fines if:

(1) The court mailed to the individual's most current address on record with the court by first-class mail,

postage prepaid, an initial warning that the individual's failure to pay the fines will result in suspension of his or her driver's license, and

(2) The court mailed to the individual's most current address on record with the court by first-class mail, postage prepaid, a notice of imminent suspension of his or her driver's license if he or she fails to pay the fines.

(Trial Tr. at 76-78) (emphasis added).

No matter that Mr. Walter never contested that he knew that it was illegal to drive with a suspended license. Rather, his theory of defense was (1) that a person should not be convicted of driving while suspended if he had not in fact learned that his license had been administratively suspended, and (2) that he (Mr. Walter) had never learned that his license had been administratively suspended. (Trial Tr. at 80, 91, 116-21, 129,161-63.) As set forth below, this turned out to be merely an equitable argument, lacking support from any jury instructions.

Prior to opening statements, counsel for the State was permitted to make a motion outside the jury's presence to preclude defense counsel from discussing or eliciting testimony regarding (1) Mr. Walter's employment as a delivery driver for Home Depot, (2) the background check that he had passed to obtain that position (including a driving record check), and (3) his assumption that had his license been suspended prior to June 16, 2009, he would have been notified and terminated or

suspended by Home Depot as one of their delivery drivers. The State's objections included, *inter alia*, (1) that such evidence would be irrelevant "because there isn't a mental state associated with driving while suspended," and (2) that if the jury learned that Mr. Walter drove for Home Depot following a background check, a prejudicial inference would arise that Mr. Walter's license had not been suspended. (Trial Tr. at 79-85.)

Defense counsel objected that the State's motion would deny Mr. Walter an opportunity "to tell his story completely." (Trial Tr. at 80.)

After first ruling that defense counsel could elicit and discuss testimony regarding Mr. Walter's employment as a Home Depot driver and the pre-employment screening process, but not about his assumption that Home Depot would have learned about the suspension of his license, the court was ultimately persuaded to rule that there could be no discussion or evidence regarding any of the matters objected to by the State. The court precluded the defense from presenting any evidence that Mr. Walter drove for Home Depot, much less that he had been screened for that position. In so ruling, the court emphasized that Mr. Walter was not driving a Home Depot truck at the time he was stopped, although it was uncontested that he was contemporaneously a delivery driver for Home Depot. (Trial Tr. at 83-84 and 86-87.)

The parties' respective opening statements highlight a key distinction relevant to this appeal – specifically, whether the State simply needed to prove that Mr. Walter's license was in fact suspended at the time of his arrest, or whether the State was required to prove that Mr. Walter received actual notice of the suspension of his driver's license prior to his arrest.

The State predicted that the evidence would show that Trooper Finley pulled Mr. Walter over, obtained and verified his driver's license, and then called in the relevant information on the license and determined that it had been suspended. Defense counsel predicted the evidence would show that Mr. Walter never knew that his license had been suspended until he was so informed by Trooper Finley. (Trial Tr. at 89-91.)

Both parties' predictions proved accurate. Trooper Finley testified that he initially pulled Mr. Walter over for failing to use his turn signal, subsequently obtained Mr. Walter's driver's license, called it in to dispatch, determined it had been suspended, and then arrested and ticketed Mr. Walter for driving while suspended. Trooper Finley also explained that it is not uncommon for a person to retain the plastic copy of his or her license if the license has been administratively suspended rather than physically taken by law enforcement or a court. (Trial Tr. at 94-98.)

Mr. Walter, on the other hand, testified that he had never received a mailed notice that his license was going to be suspended if he continued to fail to pay the remainder of a fine on a prior traffic citation, much less later notices that suspension was imminent and/or in effect. Indeed, whereas he had initially received notice that his license might be suspended because of delinquent child support payments, he had more recently been notified that he was no longer at risk of suspension for that reason. He also testified that he paid his late traffic fine and license reinstatement fee the day after he was released from jail for driving while suspended. Per the court's earlier ruling, he was not allowed to testify about why he thought his current position as a screened delivery driver for Home Depot contributed to his belief that his license had not been suspended at the time of his arrest. (Trial Tr. At 116-20.) Mr. Walter conceded that the traffic citation he had originally failed to fully pay had included the following language: "Failure to appear in Court or pay assessed fines, costs or restitution may result in the suspension of your driver's license or privilege to drive. (Trial Tr. at 128) (emphasis added). However, he also testified that he had not read the foregoing warning when he was previously cited. (Trial Tr. at 130.)

On rebuttal, justice court clerk Amy Blixt testified for the State that her office, prior to the date of his arrest in this case, had mailed Mr. Walter: (1) a notice that he had failed to fully pay for a prior traffic citation, accompanied by a

notification of the imminent suspension of his driver's license; and then (2) a second notification of non-payment, accompanied by a notification of actual suspension of his driver's license. She also testified that she assumed the foregoing notifications had in fact been delivered to the address on Mr. Walter's driver's license, as none of the notifications was included in his justice court file in the form of returned mail. Finally, she testified that Mr. Walter had not asked to have the address on his driver's license changed when he applied for reinstatement of his license following his arrest in this case. (Trial Tr. at 133-40.)

On cross-examination, Ms. Blixt conceded that she was uncertain whether she had any personal involvement with generating or sending the notifications. In fact, she was uncertain whether she was working in the office of the relevant justice of the peace (as opposed to the office of the other Missoula County justice) at the time the notifications were generated and sent. Finally, she conceded that she did not know for certain that Mr. Walter had received the foregoing notifications. (Trial Tr. at 140-41.)

In accordance with the instructions given to the jury prior to opening statements, quoted above, as well as in keeping with the plain language of the driving while suspended statute, the State prevailed in its position that only proof of the suspension of Mr. Walter's license was required, regardless of whether Mr. Walter was actually made known of that suspension. (Trial Tr. at 145.)

Following Ms. Blixt's rebuttal testimony, the court instructed the jury exactly as before regarding, *inter alia*, the definition of driving while suspended, the elements of driving while suspended, the elements of adequate notice of suspension, and that ignorance of the law is no defense in Montana. (Trial Tr. at 149-50.)

During its closing argument, the State used those instructions to stress its position that a person can be guilty of driving while suspended without knowing his license has in fact been suspended. Specifically, counsel argued:

> Now the defendant said that he was driving around assuming that he had a valid driver's license. So read the instructions closely here. There's no requirement that the defendant know he has a suspended license or – or assume he has a suspended license. It's stated directly. It's strict liability.
>
> Irrespective of what you don't know – or do know, assuming that he didn't know, let's – let's give him the benefit of the doubt on that. Assume that he didn't know. Now the facts state otherwise, but assume that he didn't know. Well, the law still says he's guilty of driving with his license suspended. Strict liability. There's no mental state required. You don't have to intend to drive around with a suspended license. All the law requires is that you're driving around with a suspended license.

(Trial Tr. at 166.) Likewise, the State used the adequate-notification instruction to both emphasize why Mr. Walter should have known his license had been suspended and to argue why ignorance was no defense if he had not received actual notice. (Trial Tr. at 157-58, 166-67.)

Defense counsel, on the other hand, was left to recount the evidence suggesting Mr. Walter had not received actual notice that his license had been suspended, but without any instructions on which to frame a meaningful theory of defense. (Trial Tr. at 160-64.)

Mr. Walter was again found guilty on both tickets. (Trial Tr. at 172.) On the driving while suspended count, he was sentenced to six months of jail with all but two days suspended, he was fined $350.00, and he was ordered to pay court, jury, and public defender costs. (Trial Tr. at 184-85; Amended Judgment, D.C. Doc. 17.)

The sole issue presented herein relates to evidence that the State was permitted to admit at the close of its case-in-chief. Namely, over defense counsel's objection, the State presented the jury with a "self-authenticating certified copy ... of Mr. Walter's driving record verifying that his license was suspended" at the time of his arrest. The driving record had been generated by the Montana Department of Motor Vehicles ("DMV"). No witness testified regarding the actual generation of that document or its contents. (Trial Tr. at 115.)

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STANDARD OF REVIEW

This Court reviews *de novo a* district court's interpretation and application of the Confrontation Clause set forth in the Sixth Amendment to the United States Constitution. *State v. Mizenko*, 2006 MT 11, ¶ 8, 330 Mont. 299, 127 P.3d 458.

SUMMARY OF THE ARGUMENT

Under the United States Supreme Court's recent Confrontation Clause case law, the district court violated Mr. Walter's right to confront witnesses against him by admitting Mr. Walter's purportedly "self-authenticating" driving record without witness testimony regarding the document's genesis and/or contents. That unconfronted driving record proved a fact that the State is now estopped from arguing wasn't elemental to Mr. Walter's conviction for driving while suspended. He deserves a new trial.

Insofar as the State might argue that his suspension was also proved by the justice court notification letters admitted during the rebuttal testimony of Ms. Blixt, the record is clear that Ms. Blixt was unsure that she even worked in the office of the relevant justice at the time, and she had no recollection of any personal involvement of the generation and/or sending of the notifications to Mr. Walter. Thus, Mr. Walter had no opportunity to confront an appropriate witness regarding their generation.

Finally, insofar as Mr. Walter might not have perfected Confrontation Clause objections to the admission of his driving record and the notification letters, their admission constituted plain error, as all of the relevant Supreme Court case law had been decided prior to his trial.

ARGUMENT

I. The district court violated Mr. Walter's right to confrontation under the United States Constitution when the court admitted a purportedly "self-authenticating" copy of Mr. Walter's driving record without any testimony regarding the genesis or contents of that record.

The State is judicially estopped from arguing that Mr. Walter could have been convicted of driving while suspended without proof of his actual suspension. "Judicial estoppel binds the State to its judicial admissions and prevents the State from taking a position 'inconsistent with previously made declarations in a subsequent action or proceeding."' See *State v. Jackson*, 2007 MT 186, ¶ 13, 338 Mont. 344, 165 P.3d 321 (quoting *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 15, 307 Mont. 45, 36 P.3d 408). Here, because the State consistently maintained that only proof of Mr. Walter's actual suspension was necessary, rather than proof of his notification of that suspension, and because the State prevailed in having that distinction be the instructed law of the trial, *Kauffman-Harmon* at ¶ 16, the State is now estopped from arguing otherwise.

The State's proof of Mr. Walter's suspension, though – namely, his DMV driving record – was admitted without supporting testimony, and thus admission of his driving record violated the Confrontation Clause of the United States Constitution. (Trial Tr. at 115.) The Sixth Amendment to the United States Constitution, made applicable to the States via the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400, 403 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Crawford v. Washington*, after reviewing the Clause's historical underpinnings, the Supreme Court held that the Clause guarantees a defendant's right to confront those "who 'bear testimony' " against him. 541 U.S. 36, 51(2004). A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Id.*, at 54.

The Supreme Court's most recent Confrontation Clause case makes clear that the "self-authenticating" driving record admitted at Mr. Walter's trial included testimonial statements that were subject to cross-examination of a DMV official who was involved in their generation. In *Melendez-Diaz v. Massachusetts*, 129 S.Ct 2527 (2009), the prosecution introduced certificates of state laboratory analysts stating that material seized by police and connected to petitioner was cocaine of a certain quantity. *Id.* at 2530. The certificates had been sworn to

before a notary public and were submitted as prima facie evidence of what they asserted. *Id.* at 2531. The Supreme Court found that although the certificates were not denominated affidavits, they acted as such, and thus they fell into "the class of testimonial statements covered by the Confrontation Clause: ...

> 'ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'."

Melendez-Diaz, 129 S.Ct. at 2531(quoting *Crawford*, 541 U.S. at 51-52) (internal quotation marks and citations from *Crawford* omitted in *Melendez-Diaz*) (underlined emphasis added).

The same analysis entitled Mr. Walter's to cross-examine a relevant DMV official regarding the generation and contents of his "self-authenticating" driving record. To be self-authenticating, the driving record had to include (1) a Montana state seal and "a signature purporting to be an attestation or execution," or (2) the signature of a DMV official certifying under seal that any other signature on the driving record had the official capacity to generate the driving record.

Mont.R.Evid. 902(1)-(2).[1] The driving record, therefore, was the effective equivalent of an affidavit, like the certificates in *Melendez-Diaz*. If not, it certainly contains "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." Thus, under *Crawford* and *Melendez-Diaz*, the statements in the driving record should have been subject to cross-examination of an appropriate DMV official, and because they were not, Mr. Walter's right to confrontation as guaranteed by the Sixth Amendment to the Constitution was violated.

The State can be expected to argue that Mr. Walter's suspension was actually effected by the justice court and that the notification letters effecting his suspension were properly admitted because Ms. Blixt was subject to cross-examination regarding their generation and contents. However, Ms. Blixt could not recall whether she was involved with generating and/or sending the notifications to Mr. Walter, and she wasn't even sure that she was working in the relevant justice's office at the time the notifications were generated or sent. (Trial

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[1] The undersigned was not counsel below. The file provided to the undersigned did not include a copy of the driving record admitted into evidence. The undersigned will take all possible steps to obtain a copy of the driving record and attach it to Mr. Walter's reply brief.

Tr. at 140-41.) That is not the meaningful confrontation required by *Crawford* and its progeny. [2]

Finally, the State can be expected to argue that Mr. Walter did not properly preserve the issue raised herein. To the extent that might be so, Mr. Walter invokes plain error review. Notably, defense counsel did object to admission of the driving record, which the court admitted without hearing further from counsel. (Trial Tr. at 115.) Although counsel did not object to the admission of the notification letters, as explained directly above, he did expose through cross-examination why their admission was plain error. (Trial Tr. at 140-41.)

This Court may undertake plain error review of an unpreserved issue "that implicate a defendant's fundamental constitutional rights when failing to review the alleged error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *State v. Hayden*, 2008 MT 274, ¶ 17, 345 Mont. 252, 190 P.3d 1091 (citing *State v. Daniels*, 2003 MT 247, ¶ 20, 317 Mont. 331, 77 P.3d 224). Clearly, the present issue implicates Mr. Walter's fundamental

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[2] The undersigned's file only includes the Notice of Imminent Suspension and the Notice of Failure to Pay that accompanied it, both of which are attached as Appendix A to this brief. Again, the undersigned will take all possible measures to obtain any other notifications admitted at trial and attach them to Mr. Walter's reply brief.

constitutional right to confront the witnesses against him. The contested evidence went directly to the very element that the State persuaded the court to instruct in lieu of Mr. Walter's actual awareness of the suspension of his license. Moreover, the driving record included a state seal and/or attestations to that effect, and the notification letters were signed by a judge. In both cases, the evidence bore official markings that likely gave them greater weight with the jury, making confrontation via cross-examination all the more important. Without this evidence, the State could not have proved its case. Thus, failing to review the error raised herein would "result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *Hayden*, 2008 MT 274, ¶ 17. Notably, both of the Supreme Court cases on which Mr. Walter relies were decided prior to his trial.

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CONCLUSION

Mr. Walter was denied his fundamental constitutional right to confront the witnesses against him with respect to whether his license had been suspended at the time of his arrest. He deserves a new trial, even if plain error review is required.

RESPECTFULLY SUBMITTED this 29th day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2010, I caused a true and accurate copy of the foregoing brief to be mailed to:

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and

Suzy Boylan, Deputy County Attorney, County Courthouse, 200 W. Broadway, Missoula, MT 59802.

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David Avery

CERTIFICATE OF COMPLIANCE

In accordance with Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionally spaced New Times Roman text typeface of 14 points, is double-spaced except for footnotes and quoted and indented material, and has a calculated word count not more than 10,000 words, not averaging more than 280 words per page, excluding certificates of service and compliance.

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David Avery